SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

No. 660.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselear County and Chatham, Columbia County and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York,
Appellants,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,
Appellee,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,
Intervenor-Appellees.

Appeal from the Court of Appeals of the State of New York.

BRIEF

Of the Lutheran Church-Missouri Synod as Amicus Curiae.

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TABLE OF CONTENTS.

	Page
Interest of Amicus	1
Summary of Argument	3
Argument	4
Not all state legislation involving parochial school children necessarily transgresses the First Amendment. State aid to school children, including students in church-related schools, is constitutional if there is a secular legislative purpose and if its primary effect is not to advance religion	4
1. The established tests—Everson and Schempp	4
2. The Secular Legislative purpose of New York's textbook loan law is clear	6
3. The primary effect of the law is not to advance religion	8
Conclusion	10

Table of Authorities.

Abington School Dist. v. Schempp (1963), 374 U. S. 203	5
Cantwell v. Connecticut (1940), 310 U. S. 296	4
Cochran v. Louisiana State Board of Education (1930), 281 U. S. 370	7
Everson v. Board of Education (1940), 330 U. S. 1	4, passim
Pierce v. Society of Sisters (1925), 268 U. S. 501	2
Wickard v. Filburn (1942), 317 U. S. 111, loc. cit. 131	2

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INTEREST OF AMICUS.

This brief is submitted with the consent of counsel for the parties in behalf of The Lutheran Church-Missouri Synod, which is the corporate synod or parent church for some 6,000 member congregations located principally

in the United States and having in excess of 2,800,000 members.

For over 100 years the member congregations of this amicus have exercised the constitutional right recognized in **Pierce v. Society of Sisters** (1925), 268 U. S. 501, to operate elementary and secondary schools in compliance with state standards for secula education. At present, some 1,339 elementary schools and 24 secondary schools are being operated by the individual or cooperative efforts of the member congregations of this amicus.

This amicus and all its constituent bodies would be strongly opposed to any governmental attempt to limit or control the right accorded under the First Amendment to the free exercise of religion, including the right to maintain and opefate religiously-oriented schools. The correlative of the precious regard for the freedom to exercise one's religion is the obligation likewise to resist any benefit from government—local, state or federal—proffered to it as a religion or church. Not only does this amicus subscribe to the philosophy and beneficent purpose underlying the Establishment Clause of the First Amendment, it recognizes the operative force and pragmatic truth of the axiom that any particular program which the government subsidizes, it may regulate, and the recipient of the governmental benefit has no basis of complaint on account thereof. **Wickard v. Filburn** (1942), 317 U. S. 111, loc. cit. 131.

However, this amicus feels that there are and can be many efforts by government, under its power to promote the public welfare, including that of parochial school children, which may be countenanced under the religion provisions of the First Amendment, and it is to be hoped that the Court in applying the tests heretofore stated or as they may be refined will not on a doctrinaire basis preclude all such governmental efforts. Hence, the participation of this amicus.

SUMMARY OF ARGUMENT.

This Court has already established that not every form of state aid in the field of education transgresses the First Amendment just because children in church-related schools are also beneficiaries of the state program.

A state program will not violate the religion provisions of the First Amendment if it has a secular legislative purpose and its primary effect is not to advance religion.

New York's textbook law, by its own declaration of purpose and policy and on the basis of the current need of our society for all school children to have the educational tool of modern, quality textbooks, has an obvious, compelling, secular legislative purpose.

The secular impact of New York's textbook loan law in providing secular textbooks to all school children at their request on a loan basis is clear, and does not have the primary effect of advancing any one religion or all religions.

ARGUMENT.

Not all state legislation involving parochial school children necessarily transgresses the First Amendment. State aid to school children, including students in church-related schools, is constitutional if there is a secular legislative purpose and if its primary effect is not to advance religion.

1. The established tests—Everson and Schempp.

Any consideration of the issue before the Court must start with **Everson v. Board of Education** (1947), 330 U. S. 1.

This case apparently means different things to different people, perhaps understandably so as in the case of any landmark decision. But many who call it a seminal decision, would treat it as a terminal decision.

However, **Everson** did establish that not all state action in exercise of its public welfare power which involves aid or expenditures to or for the benefit of school age children, including parochial school children, necessarily transgresses the First Amendment as made applicable to the states by the Fourteenth Amendment. **Cantwell v. Connecticut** (1940), 310 U. S. 296. Rejected was a test so dogmatic that any and every form of benefit to a parochial school student is *ipso facto* an unconstitutional benefit to the church-related school he attends.

In **Everson**, this Court admonished itself that in protecting citizens from state-established churches the Court must "not inadvertently prohibit [a state] from extending general state law benefits to all its citizens without regard to religious belief." 330 U. S., loc. cit. 16.

Analyzing the facts and balancing the thrust of the majority and minority opinions, it would appear that

Everson stands for the proposition that certain forms of state aid may be granted to a parochial school child or his parents, notwithstanding a collateral or incidental benefit to the school he attends, if such benefit is accorded pursuant to a legitimate exercise of the state's power in the field of public welfare and to achieve a valid state objective and if such aid is accorded on a non-discriminatory basis without regard to religious beliefs or lack thereof and if the implementation of the state program remains under secular, public control. **Everson** recognizes explicitly that underwriting the cost of school transportation might enable certain parents to send their children to a parochial school who might otherwise be financially unable to do so, but, held the Court, this does not constitute financial support of the parochial school.

Everson says the state must maintain neutrality in its relations with groups of religious believers and non-believers. The First Amendment does not require the state to be the adversary of religion. "State power is no more to be used so as to handicap religions than it is to favor them." 330 U. S., l. c. 18.

Having established that a doctrinaire approach is not to be followed when considering state legislation vis à vis the First Amendment, the Court elaborated in **Abington School District v. Schempp** (1963), 374 U. S. 203, loc. cit. 223, on the test to be applied to state legislation, as follows:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

2. The secular legislative purpose of New York's textbook loan law is clear.

The statement of policy of the New York legislature in enacting Chapter 320 of the Laws of 1965 is as follows:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other nonsectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." (As quoted in the concurring opinion of Staley, Jr., J., in the Appellate Division of the Supreme Court of New York. Page 45a of Appellants' Separate Appendix.)

The New York Court of Appeals construed the statute and the policy declared in its enactment as demonstrating that it is meant to bestow a public benefit upon all school children in grades 7 through 12, and held that a program aimed at improving the quality of education for all such children in the state is a matter of legitimate state concern.

The **Everson** case established, if still open to question, that legislation intended to facilitate the opportunity of children to obtain a secular education serves a public pur-

pose. 330 U. S., loc. cit. 7. See, also, **Cochran v. Louisiana State Board of Educ.** (1930), 281 U. S. 370. While this Court was there addressing itself to challenges in the area of due process, the basic truth remains that there is a recognized and legitimate area of concern in the states in the matter of the quality and effectiveness of education and in educational opportunities for every child.

Certain efforts in the area of education may be sufficient for one day and one set of conditions. Different efforts may be appropriate under changed conditions. As this Court has said with respect to the necessity for it to keep a proper perspective concerning the power of the state in the field of public welfare:

> "Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment does not strip the states of their power to meet problems left for individual solution * * *" 330 U. S., l. c. 6.

As this Court is aware, more knowledge has accumulated since World War II than in any prior century. Much of the present gross national product of our nation is directly related to industries which are based on scientific discoveries made in this generation and much of it quite recently. It is widely accepted that the tempo of change will accelerate. In other times when knowledge was not accumulating at its current pace, the use of out-of-date or marginal textbooks might not be of sufficient concern for a state to undertake a program designed to put quality textbooks in the hands of all students, public or non-public. However, the necessity for all students in a viable, developing, progressive, technical society to have the benefit of textbooks embracing the latest knowledge and employing the best of modern teaching techniques can now

be a matter of compelling state concern. It is submitted that such thinking is apparent in New York's textbook law and that the secular legislative basis for the law is clear.

3. The primary effect of the law is not to advance religion.

The classic statement of Justice Black in **Everson**, 330 U. S., l. c. 15-16, setting forth the meaning of the "establishment of religion" clause, furnishes the broad general test:

> "* * * the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa * * *".

New York's statute does not set up a church. It does not aid any particular religion or prefer one religion to another, since the textbooks are available upon request of any school child, regardless of his particular religious affiliation or lack of any. No person is influenced to go to or to stay away from any church or to profess any belief or disbelief in any religion. There is no punishment for entertaining or professing a religious belief or disbelief.

There remains, therefore, the question whether New York's statute, in a constitutional sense, aids all religions and whether any tax monies are levied to support any religious activities or institutions.

Those who assert an affirmative answer to these questions predicate their argument on the basis that the furnishing of textbooks to the children thereby aids the school and the religious organization sponsoring the school.

In the case of the New York statute, it should be noted (1) that the books are supplied by way of loan only to individual pupils on request and (2) that before the enactment of the present law it was the individual parents of children in religiously-affiliated schools who supplied the books at their own expense.

The Legislature did not have as its objective aid to institutions. The obvious basic purpose of the Act is to put into the hands of the student, on a non-discriminatory basis, the necessary secular educational tool, the textbook. One stated assumption of the legislature is that not all students have available the proper, necessary tool for learning and such fact is leading to a disparity in the educational experience of such students. Any benefit to the school attended by the student is collateral and so held the Courts of Appeals of New York.

As this Court held in **Everson**, not every form of assistance to a parochial school child or to the parents of such a child constitutes aid to the school the child attends. And appellants and supporting amici specifically remove from their attack certain forms of state aid, such as, hot lunches, eye and dental check-ups, vaccinations and the like, on the basis that such are solely aid to the child. This concession is made notwithstanding the fact that if the state did not provide such assistance the parochial school or the parent would have to provide the same benefit and notwithstanding the fact that the success of the

teaching program in the parochial school may be advanced by reason of the improved health and absence of hunger among the students.

It is submitted that the distinction which appellants seek to draw between those concededly legal public welfare programs affecting religiously-affiliated schools and the New York Textbook Loan Program is an artificial distinction unsupported by the decisions of this Court. The principle uniformly applied in such cases as **Cochran, Everson** and **Schempp,** is that a statute will not be held to contravene the Establishment Clause if a secular legislative purpose is in fact fulfilled and there is no primary effect advancing religion. The provision of textbooks under New York's statute clearly meets this test. The selection and distribution of the textbooks are the responsibility of the public authority, the school board. The product is secular, namely, school textbooks approved by the public, secular authority. The product cannot be diverted from its state-intended purpose, i. e., the provision of secular, academic materials to the student. The statute is "neutral" toward religion and church-related schools, government being neither the adversary nor the sponsor of religion.

CONCLUSION.

It is respectfully submitted that this Court should sustain the order of the Court of Appeals of the State of New York.

Respectfully submitted,

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